IN THE COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SUIT NO. 609 OF 1986

Bank of Baroda, a body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, having its Head Office at Madvi, Baroda,State of Gujarat & one of its branch office known as Bank of Baroda, Nariman Point Branch, Nirmal Building, Bombay-400 021. ..**Plaintiff**

Versus

1. **Messrs. Ashish Texo Industries Private ltd.**, A private ltd. company incorporated and registered under the companies Act,1956 (No.1 of 1956) having its registered office at 409 Gundesha Chambers Nagindas Master Road, Fort, Bombay-23.

2. **Shri Dilipkumar Radhakishan Dalmia, and**

3. **Shrimati Kusumdevi Dalmia** both of Bombay Indian Inhabitants residing at 512, Sardar Patel Road, Parekh Mansion, 2nd floor, Bombay-400 004.

4. **Shri Shankarlal Agarwal** also of Bombay Indian Inhabitant residing at 15, Ameeta Bldg, Opposite Sachivalaya, Bombay-400 021. ..**Defendants**

Mr. V.V. Shinde i/b. Tandel and Co. for Plaintiff.
Mr. Girish Desai i/b. K.S. Jain for defendant No.4

CORAM : S.R.SATHE,J.

... 2/-

DATED : 23rd DECEMBER, 2005

ORAL JUDGEMENT :-

1. The Plaintiff natioinalised bank has filed this suit against defendant Nos. 1 to 4 for recovery of the amount of Rs. 7,65,046.40 ps. and future interest on the said amount at the rate of Rs. 19.5% per annum from the date of suit till realisation of the amount.

2. Plaintiff's case in brief is that the defendant No.1 is Private Limited Company, registered in accordance with the law relating to Companies and carries on business of Exports, Imports and as Cotton Merchants. The defendant Nos. 2 and 3 were the directors of defendant No.1 at all material times. The defendant No.4 stood as guarantor for the transaction of defendant Nos.1 to 3 with Plaintiff bank and in particular for the advance facility granted by the Plaintiff to defendant No.1.

3. In December 1982, Plaintiff Bank granted defendant No.1 an advance by way of bill purchase facility with the limit of Rs. 5,00,000/-. In respect of the said facility, defendant No.1 executed a letter of bills purchased undertaking dated 15/12/1982 as well as a letter of undertaking. The Plaintiff Bank

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purchased/ discounted between December-1982 to February, 1983, four bills drawn by defendant No.1 in favour of Plaintiff Bank. The total principle amount of the bill was Rs. 5,05,651.15 ps. and total amount advanced by the Plaintiff to defendant No.1 by way of discount/ purchase was Rs. 4,99,651.15 ps. The above mentioned four bills were accompanied by Motor Transport Receipt issued by two transport operators namely “All India Quick Transport Operators” and “Shree Mahadeshwara Lorry Service”, purportedly setting out the description of the goods sold by defendant no.1 to the drawees of the bills as aforesaid. However, when the said bills were presented to the drawees for payment, they did not honour the same. When the Plaintiff Bank contacted “Shree Mahadeshwara Lorry Service”, they informed Plaintiff that the said transport receipts were stolen or forged and issued without their knowledge. When Plaintiff sent a letter making quarry to other transport company, the said letter was returned with remark “left”.

4. By a letter of guarantee dated 15/12/1982, the defendant Nos.2 and 3 had guaranteed to the Plaintiff the due payment of all the amount due to Plaintiff in

respect of bills purchase facility granted to defendant No.1. Similarly, by letter of guarantee dated 26/10/1983, defendant No.4 guaranteed to the Plaintiff the due repayment of all the amounts due to Plaintiff from defendant No.1 in respect of the said bills purchase facility including interest, commission etc.

5. As the defendants failed to clear dues of Plaintiff/ Bank, the Plaintiff/ Bank issued a letter through advocate to defendant No.1 on 27/04/1985 and called the defendant No.1 to clear the dues. The defendant No.1 gave reply dated 21/05/1985 and contended that Plaintiff's demand was premature.

6. On 16/11/1985, Plaintiff issued through advocate a joint letter to defendant Nos.2 to 4 and called upon them to clear the dues under the bill purchase account of defendant No.1. Inspite of the same, the defendants failed to repay the amount, hence Plaintiff filed suit for recovery of the amount of Rs. 7,65,046.40 ps. inclusive of interest upto 15th December, 1985.

7. From the perusal of the record, it appears that the defendant No.1 company went into liquidation and

Plaintiff failed to take steps against official liquidator. Hence, the suit was dismissed against defendant No.1 by virtue of the order passed by this Court on 06/02/2003. The defendant Nos. 2 and 3 failed to file Written Statement. Hence, the suit was decreed against them in terms of prayer clause (a) on 06/02/2003.

8. The defendant No.4 filed his Written statement on 23/09/1996 and opposed the suit claim. He contended that he is not at all concerned with the dealings between Plaintiff and defendant No.1 and he had no knowledge about their transaction prior to letter dated 26/10/1983. According to defendant No.4, letter of guarantee dated 26/10/1983 was taken for the purposes of future advances only and not for the past advances. The defendant No.4 therefore contended that he is not liable for the suit claim which is in respect of past advances.

9. The defendant No.4 also contended that the Plaintiff has in fact not advanced any amount to defendant No.1 and hence he is discharged. Besides this, he also contended that Plaintiff Bank obtained

his signature on printed form on the representation that the Plaintiff would advance further amount to defendant No.1 firm to the tune of Rs. 5 lacs. He therefore, prayed for the dismissal of the suit. Without prejudice to the above mentioned contentions, the defendant No.4 contended that the Plaintiff bank has charged excessive interest and claim made by Plaintiff is not correct.

10. On these pleadings, the Court ***(CORAM: F.I. REBELLO,J.)*** has framed following issues. I have given my findings as mentioned against the same :-

SR. NO.	***ISSUES***	***FINDINGS***
1.	Whether defendant No.4 proves that the suit against him is misconceived and not maintainable?	**NO.**
2.	Whether defendant No.4 proves that the guarantee dated 26th October, 1983 Exhibit D to the plaint was taken for future advances only and that no consideration was passed for coming into operation of the said guarantee ?	**NO.**
3.	Whether defendant No.4 proves that he is discharged from his liability under the guarantee dated 26th October, 1983 exhibit D to the plaint?	**NO.**

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SR. NO.	***ISSUES***	***FINDINGS***
4.	Whether the plaintiff proves that the defendants are liable to pay the decreetal amount ?	**YES.**

11. In order to prove the suit claim Plaintiff bank has filed affidavit of evidence of its employees Ramsing Shetia, Assistant General Manager of the Plaintiff bank working at Nariman Point Branch as well one Sham Tukaram Jadhav, Senior Manager of the Bank of Baroda, Nariman Point Branch and also produced the original documents executed by the defendant Nos. 1 to 4. As mentioned above, suit is already decreed against defendant Nos. 2 and 3. Besides this, both the Plaintiff's witnesses have clearly stated about the execution of the document and its correctness. Plaintiff's evidence in that behalf is also not challenged seriously and there is no reason to disbelieve the same. So, it is clear that the Plaintiff has proved that when the suit was filed principal amount of Rs. 4,99,651.15 as well as interest thereon was due and thus in all Rs. 7,65,046.40 has been due from the defendants.

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12. The main and material question is whether the defendant No.4, as a guarantor is liable to pay the said amount to the Plaintiff bank. At the outset it must be mentioned that execution of the guarantee deed dated 26/10/1983 Exh.P-2 is not disputed. Even the defendant No.4 has clearly admitted that the said guarantee is signed by him on 26/10/1983. His only contention is that at the time of signing the said guarantee deed the officers of the Plaintiff bank had told him that the guarantee that was being executed by the defendant No.3 is in respect of future advance that would be made to the defendant No.1 and it has nothing to do with the past dues or advances. However, firstly, it must be noted that besides the bear interested word of the defendant No.3 there is absolutely nothing on record to show that such representation was made by the Plaintiff bank to the defendant No.4. If really such representation would have been made then certainly the defendant No.4 would not have failed to obtain specific writing to that effect from the Plaintiff. But that has not happened. We can not ignore the fact that defendant No.3 is not an illiterate person but on the contrary, he has studied upto B.Sc. (Agri) and he is a chairman of Altra Movie Channel Ltd. and other Altra Group

companies, doing business of manufacturing VIDEO cassettes and CDs and DVDs. From his deposition also it is very clear that he is not a person who is not aware of the business transactions and the execution of the documents. He appeared to be shrued businessman. Initially, he tried to create an impression that he had not even visited the Plaintiff's bank at any time and that he had no dealing with the Plaintiff bank. However, when he was confronted with his document he had to admit that he is a partner in the firm Jairamdas Bhagchand and the said firm is having account in the Plaintiff bank. When such is the position it is not possible to accept the bare testimony of the defendant No.4 when he says that at the time of execution of guarantee deed, officers of the Plaintiff bank had told him that guarantee is being obtained for future advance that will be given to the defendant No.1.

13. It is an admitted fact that defendant Nos. 1 to 3 were well known to the defendant No.4 and they had business transaction amongst them for a long period. The very fact that the defendant No.4 stood as a guarantor to the defendant No.1 for such a huge amount clearly goes to show that he had good relations

with the defendant Nos. 1 to 3 and he wanted to help defendant Nos. 1 to 3. So, under such circumstances, he executed the agreement of guarantee. Incidently, it must be noted that if really the defendant No.4 would have executed the guarantee deed because of the representation made by the plaintiff bank as alleged by the defendant No.4 then certainly atleast at the time when Plaintiff bank issued notice to the defendant No.4 and called upon him to pay the dues the defendant No.4 would have given reply and stated under what circumstances he executed the guarantee deed. But that has also not happened. So, non giving of reply to the plaintiff's notice also speaks volume.

14. Leaving aside the oral evidence and other circumstances of the case, we have to see what the documents in question says, whether there is anything in the said agreement or deed which suggests that defendant No.4 stood as a guarantor only for future transactions which were to take place after the execution of the guarantee or whether it appears that the defendant No.4 has clearly admitted his liability to pay the dues of the defendant No.1, that is amount which was then due as well as the amount that would fall due thereafter.

15. In the guarantee deed dated 26/10/1983, it is clearly mentioned

> *"in consideration of bank of Baroda giving credit or accommodation or granting facilities to Defendant No.1 by making/ opening/ continuing a Loan/ Overdraft/ Cash Credit account or by discounting purchasing and/or negotiating bills with or without security and/or in consideration of the Bank opening and giving letters of credit and/or trust receipt facilities in favour of M/s. Radhakishan Dalmia and son on terms and*

conditions that my be settled between you and the said M/s. Radhakishan Dalmia and sons at any time and also all of bills promissory notes or guarantees held by the bank".

16. So, from these particular words in the guarantee deed it is clear that defendant No.4 stood as a guarantor to the defendant No.1 for due payments of all the amounts due to the plaintiff from the defendant No.1 in respect of the facility mentioned in the deed and he was even a guarantor for continuing the loan facility to defendant No.1. So, it is very clear that defendant No.4 stood as guarantor for all the amounts due from the defendant No.1 to the Plaintiff.

17. A feeble attempt has been made on the part of the defendant No.4 to show that when guarantee deed was executed the Plaintiff bank was aware that the transport receipts given by the defendant No.1 were not accepted by the transporter and the defendant No.1 had played a fraud upon the Plaintiff bank. However, the Plaintiff bank did not inform the defendant No.4 about the said fraud and as such the guarantee deed dated

26/10/1983 is not legal. However, it must be noted that as a result of dishonour of the bills and transporters not accepting the genuineness of transport receipts for the amount fallen due from the defendant No.1 to the Plaintiff bank, it was in fact necessary for officers of the Plaintiff bank to have security for defendant's transaction and as such defendant Nos.1 to 3 had brought defendant No.4 as a guarantor. So, under such circumstances, whether Plaintiff had informed the defendant No.4 about the transporter's rejecting the transport receipts given by the defendant No.1 or not is not material. In any event when defendant No.1 offered defendant No.4 as a guarantor and defendant No.4 accordingly executed the deed of guarantee on 26/10/1983 the defendant No.4 is bound to make the payment as per the said agreement. Hence it is very clear that there is no substance in the contention taken by the defendant No.4 and Plaintiff has proved the suit claim even against defendant No.4. So, Plaintiff has proved the suit claim and that the defendant Nos. 2 to 4 are jointly and severally liable to pay Rs. 7,65,046.40 ps.

18. In this view of the matter, the defendant No.4

to pay plaintiff bank (jointly and severally with defendant Nos. 2 and 3) sum of Rs. 7,65,046.40 ps. and future interest on principal amount of Rs. 4,99,651.15 ps. at the rate of 12% p.a. from the date of suit till realisation of the amount. The defendant No.4 to pay the costs of this suit and bear his own.

(S.R. SATHE, J.)